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On Women and Legal Forms

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INTRODUCTION

Being in the lucky position to have received a Jean Monnet Fellowship at the European University Institute, I had the possibility to spend the academic year of 1993-1994 in the cradle of renaissance art and of the central perspective.

Besides "extra-academic" inspiration, and the luxury of uninterrupted time for reading and writing, this stay provided the opportunity to participate in two courses conducted by professor Yota Kravaritou on "Approches féministes du droit en Europe et aux Etats-Unis" and "Droits de l'homme, droits de femme et egalité".

These courses and participation in the meetings of the ECC Interdisciplinary Women's and Gender Studies Group at the institute presented a possibility to become more acquainted with general discussions about feminist jurisprudence and feminist studies in other parts of Europe and the European Union as well as beyond Europe.

I hope that this Working Paper may in return benefit interested individuals and groups at the European University Institute as well as outside.

The following text forms a chapter in a larger manuscript entitled "Homeknitted law. Norms and Values in Gendered Rulemaking", which was written during my stay, and which will hopefully be published in its entirety in a not too far future.

Copenhagen, September 1994

Hanne Petersen

ON WOMEN AND LEGAL FORMS

"..it is obvious that categories and classes which serve very well for one purpose may break down when used in a different context"[1)]

EXCLUSION OF WOMEN'S LIVES AND EXPERIENCES FROM WESTERN LAW

The art historian Ernst Gombrich in an essay on "Norm and Form" deals specifically with the stylistic categories of art history and their origin in renaissance ideals. Many of the stylistic terms used by art historians originated, he writes, as ways of criticizing a stylistic deviation from the - classical - norm.

The terminology of art history was largely built on what Gombrich calls "terms of exclusion", or "principles of exclusion". For those who follow the classical canon the disharmonious, the arbitrary, and the illogical must be taboo.

These terms of exclusion were negative terms like the Greek term Barbarian meaning only a non-Greek,[2)] and their use and frequency in our language illustrate "the basic need in man to distinguish 'us' from 'them', the world of the familiar from the vast, unarticulated world outside that does not belong and is rejected" (1978, p.88).

Gombrich claims that most movements in art erect some new taboo, some principle of exclusion, and he suggests that

" Maybe we would make more progress in the study of styles if we looked out for such principles of exclusion, the sins any particular style wants to avoid, than if we continue to look for the common structure or essence of all the works produced in a certain period." (1978, p.89).

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1. Gombrich, E.H. (1978): Norm and Form. The Stylistic Categories of Art History and their Origin in Renaissance Ideals. In the same "Norm and Form. Studies in the Art of the Renaissance", Phaidon, London and New York, p.88

2. As examples of such "exclusive" terminology, Gombrich mentions "gothic being increasingly used as a label for the not-yet-classical, the barbaric, and barocco for the no-longer-classical, the degenerate" (op.cit.p.84). Other examples are the use of the term 'rococo' and 'primitive'.

The categorization of certain types of norms and patterns of order as "law" has certainly had as the result an exclusion of a great number and variety of normative phenomena and types of social order. These are not just those which came to be labelled primitive or traditional law (not-yet-modern-law) or religious or moral norms (no-longer-law) or customary law (only-seldom-law).

The increasing differentiation of the concept of law itself into "exclusive" concepts, such as for instance non-state law, non-western law, indigenous law, informal law, women's law etc. indicates some principles of exclusion which have been at work in the formation of the category of "law". - The exclusion of many of these types of orders has implications for women, since several of them are concerned with normative approaches to relations which are of great - and perhaps specific? - importance in the lives of women.

But not only has the exclusion of these other types of orders had implications for women. I also want to argue that one of the principles of exclusion in western law has been, and to a large degree still is the exclusion of women, either directly as women (female persons) or of the realities, experiences and bodies of women.

For a long period women were excluded as women from participating in the law-making process and other "public" arenas - from the vote, from being considered as legal actors, from owning property, and from certain occupations. And the regulation and ordering that took place within the private arena of the family was not considered "law".

After women have become citizens in their own right, a number of regulations which have gender specific consequences have continued to exist or have come into being - in areas such as family law, welfare law and labour law, but not only here.

The "gender neutralization" of laws - as legal statutes - in the last third of the twentieth century has been seen mainly as an achievement for women and as a step towards emancipation and equality.

It is only recently that the benefits of the process of gender neutralization and alleged gender equality is beginning to become questioned from several angles - from eco-feminists, postmodern feminists, cultural feminists and non-western feminists. This is a process which resembles the increasing questioning of the concept of development in many non-western countries.

Much of the feminist critique of law has not questioned the category of (modern) law as such - as a category or a form, which focuses upon an abstract, rule-oriented type of social order. Even when modern law becomes formally gender neutralized it still to a large degree does not take into consideration that formally gender neutral regulations relate to gendered living experiences and thus have different implications for men and women. This goes for national as well as for international law - for instance human rights.

And when modern law becomes formally gender neutralized this does not change the criteria that have been established for which normative phenomena belong to the category of law. That these criteria lead to exclusion of a number of norms which order and control the lives of women, such as norms and practices about the division of labour in the family and outside the paid labour market, is seldom discussed.

It has been discussed whether you can just "add women and stir" to the disciplines of science which have excluded women's lives, or whether more thorough changes of categories - of for instance what is considered knowledge or social order - will be necessary. - There seem to be increasing signs that it will be indispensable with more fundamental changes (Harding 1991).

For a long time investigations concerning "women" have been considered dealing with and presenting "specific" problems and approaches as contrasted to a "normal" or "general" scientific perspective. If we are by now reaching a stage where this "classical", "normal" or "central" perspective is undergoing a certain dissolution, then yesterday's "norm" may also become tomorrow's exception. The uniform style seems to be fading in relation to fashion, and we may witnessing a similar development in relation to norms.

It may be difficult to encompass diverse mushrooming dress styles of different subcultures under a unified dictate of the fashion of the season. - And it may probably not be possible to include <u>all</u> social practices under the concept of law without dissolving the concept of law into the broader category of social norms.

But then on the other hand preserving the modern concept of law, as it has been understood in Western societies for decades, may not be very useful in a time,

when it has to be used in different contexts in order to contribute to the solution of problems and to deal with realities and practices of different groups.[3)]

These will be groups, I believe, which are themselves characterized by conflicts and experiences different from those which provided the foundation for the categorization of certain normative phenomena as the "law" of "modern" societies. These differences will not only be characteristic of the groups themselves but also of their environments and the societies or parts of societies in which they live.

Gombrich characterizes the principle of exclusion as a very simple principle that excludes not just for formal, categorical reasons, but also because it denies the values it opposes. - This seems to be very true also of the categorization of certain normative forms or forms of order, which are excluded from belonging to the category of "law".

Gombrich suggests - in the classification of art - a principle of sacrifice. This principle may also be useful in contemplations about categories concerning other forms of order than artistic order[4)]

"The principle of sacrifice admits and indeed implies the existence of a multiplicity of values. What is sacrificed is acknowledged to be a value even though it has to yield to another value which commands priority. But the mature artist will never sacrifice more than is absolutely necessary for the realization of his highest values. When he had done justice to his supreme norm other norms are allowed to come into their own." (1978, p.97)

If we (in the western world) want to continue to call law only that which is practised by professional lawyers and which subscribes to modern values, then persons interested in for instance questions concerning gender and social order may have to turn to other areas than "law" if they (we) want to understand and also participate in and support specific and concrete changes. This process is already on the way and will most likely continue.

If one does not consider upholding of a certain category and understanding of "law" itself the essential issue, then one may also have to find out what are the highest values, and try to find forms and categories which sacrifice as little of

3. This is also commented upon in the context of art, where Martin Damus in a sequence of three articles entitled "Die Verabschiedung der Moderne. Von elitär-moderner zu affirmativ-postmoderner Kunst" (1989), writes that "Contrary to the individually characterized art of modernity, which claims generality, postmodern art is concrete and related to itself and the immediate environment, and connected to a specific context" (my translation) (I Teil, p.65).

4. "Art is a matter of imposing order on chaos" Gombrich also writes, p.94

these values as possible, when participating in the solutions of problems concerning social order - and the relation between order and gender.

In postmodern society it may become more important - at least for some period - for the scientist and lawyer - to become a participant and part of the process of creation of both knowledge **and** solution of concrete problems.

This is an aspect, which Boaventura de Sousa Santos has dealt with in several of his articles. In his article "Towards a postmodern understanding of law" he writes that

"The modern understanding of law sacralized law and trivialized rights. The postmodern understanding of law trivialized law and sacralizes rights" (1989, p.117)

This view indicates that rights - content - become valued higher than form - 'law'.

The usefulness of Gombrich's principle of sacrifice, could perhaps be displayed especially in concrete situations, where there is a need to decide, how different norms and values - concerned with different rights - which are or seem to be in conflict, should be balanced against each other.

Gombrich claims that "(M)ost stylistic changes have more to do with the mutual adjustment of conflicting norms which can perhaps be understood but never measured by any objective formal criterion." (1978, p.97f). As law increasingly is becoming viewed as a cultural phenomenon, this observation perhaps also holds for the changes of legal classifications, styles and concepts.

The lack of belief in legal positivism deprives us of one objective standard, measure or criterion, according to which one can decide about the "goodness" or "badness" of a normative system. Thus we will increasingly have to balance and sacrifice, in the adjustment of conflicting norms only some of which are at present categorized as law.

In the following section I will deal briefly with some of the other excluded voices, which are increasingly questioning the present understanding of the concept of - modern - law.

UNDERSTANDINGS AND CRITIQUES OF MODERN LAW

In Western countries and at law schools and universities in these societies there seems to have been at least some agreement about what was encompassed under the category of 'law', and thus what has had to be taught to future lawyers.

This view of law initially served to distinguish it from past, traditional law. It saw and sees law as very linked to modern institutions primarily the state and its institutions of parliament, government and judiciary. It is a view which regards law as positive law, as uniform and as having certain universal aspirations. Law is described as formal, uniform, universalistic rules created within the framework of the nation state (Galanter, 1966).

An increasing number of critical voices are being raised against this understanding of law both from inside Western societies and legal communities as well as from outsiders both within and outside these communities.

These voices are raised by legal historians, by legal anthropologists and by lawyers who have dealt with non-western countries, and whose work has demonstrated some of the difficulties with the use of the Western concept of law; by non-western lawyers (many of whom are trained in western law), who underline the non-universality and ethno-centricity of the western concept of law; by the post-modern critics of western law, who also question law's universality and see it as a historical form which is changing; by the critique of law from ecologists, which to some extent links with the postmodern critique; and by the feminist critics of western law, who have especially criticised the androcentricity of law.

My own roots have been especially in the last strand of critique, and especially within the environment of Nordic Women's Law, and Nordic critical studies of law.[5] - Over the years I have however been heavily influenced by writing and contact with representatives of some of the other strands of critique.

The following presentation thus does not pretend to give a general overview of these other critiques, but rather to present some of the lines of thought which I have found valuable in the attempt to include the views and experiences of

5. I have been involved in Nordic women's law since 1975 when I participated in the first Meeting of Female Nordic lawyers, which has since been held every 2-3 years. From 1983-1993 I was the chief editor of the Nordic legal journal, RETFÆRD, which holds annual seminars

women in an understanding of law - an understanding which has thus also become a process of rethinking of law.

These lines of criticism take part in the general discussion about the adequacy or inadequacy of inherited categories and are also participating in the ongoing process of reevaluation and transformation of dominant transmitted values.

I will not discuss some of the early anthropological and sociological writers which have contributed to the critique of the modern concept of law (such as Malinowski or Ehrlich), although their work is of course of importance as a background for academic debate, but limit myself to the debate of the last part of the 20th century especially the last two or three decades.

A historical approach

The non-universality of law in a global setting can be underlined by investigating it in certain spaces and by stressing temporality. This is what is done by the American legal historian, Harold Berman, who employs a historical perspective of almost a millenium in his study of the formation of the Western legal tradition.[6)]

This legal tradition is closely linked to the civilization called "Western", and consists of institutions, values and concepts consciously transmitted over centuries. In the twentieth century this tradition has however ended up in a crisis more severe than any before, and one which is closely linked to the crisis of the civilization and its ideals in general.

The concept of law which is embedded in the Western legal tradition, and which Berman postulates, is not the prevailing one, but neither is it unorthodox. It is a view of law which sees it

"not as a body of rules, but as a process, an enterprise, in which rules have meaning only in the context of institutions and procedures, values and ways of thought. From this broader perspective the sources of law include not only the will of the lawmaker but also the reason and conscience of the community and its customs and usages. (p.11)"

6. Harold Berman (1983): Law and Revolution. The Formation of the Western Legal Tradition

Berman's underlining of the aspects of process, procedures, values and ways of thought makes him also advocate an interaction of spirit and matter, of ideas and experience in the definition and analysis of law.[7)]

The historical perspective, and the focus upon a tradition rather than upon a formal body of rules, allows both for a broader and less exclusive understanding of law, than the modern one, and at the same time of a less universalistic, and more contextual understanding.

For Berman it is necessary to broaden the view of law which is now prevailing, and he argues for the development of what he calls a social theory of law.

"We need to overcome the reduction of law to a set of technical devices for getting things done; the separation of law from history; the identification of all our law with national law and of all our legal history with national legal history; the fallacies of an exclusively political and analytical jurisprudence ("positivism") or an exclusively philosophical and moral jurisprudence ("natural-law theory"), or an exclusively historical and social-economic jurisprudence ("the historical school," "the social theory of law"). We need a jurisprudence that integrates the three traditional schools and goes beyond them. Such an integrative jurisprudence would emphasize that law has to be believed in or it will not work; it involves not only reason and will but also emotion, intuition, and faith. It involves a total social commitment."(p.vi,f.)

Without falling prey to often heard equations of women and emotions, there seems to be no doubt that an engagement in emotionality, intuition and faith will open up for a concern in legal discourse about issues, which are considered important also by many women, but which have hitherto been dominated or excluded by the focus on reason and rationality.

In this age of an apparent decline of the importance of rationality - or perhaps of both dis- and reorientation in this respect, the importance of "extra-rationality" in the working of law, and its interrelation with legal reason is perhaps more important than ever.

Perhaps for the values of reason and rationality to survive, and not be marginalized, they must enter into dialogue with forces and forms of power, they have hitherto scarcely considered it necessary to take seriously.

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7. op.cit. p.44

Outsider and insider critique of law

Great reservation regarding the feasibility of the western system consisting of law and its political framework in a multicultural world was raised two decades ago by Adda B. Bozeman, who stressed the **limits** of both western law and the western political system.[8)]

"Whether viewed as a set of concepts, norms, or social institutions, law everywhere is linked, explicitly or implicitly, with schemes of social and political organisation. Given the meanings carried by law in the West, the public order system here - whether subsumed in the city, the kingdom, the empire, the nation state, or the international society - has been cast traditionally in terms of the supremacy of law. Moreover, since European law has been associated from its beginnings with the need felt on the one hand to isolate and protect individual rights, and on the other to define the responsibilities of citizenship, government has been viewed preferentially as a compact or contract between men. That is to say, in this civilization in which the individual human being has been disengaged from the group, it is possible to assume that men, be they governors or governed, are capable of entering into binding obligations.

Neither of these norms, nor any of the values, beliefs, or perceptions upon which they rest, can be presumed to exist in other systems of public order, most of them also trusted by the people they enclose, even though they may appear overtly coercive from the Occidental point of view" (Bozeman 1971, p.xii,f. - emphasis added here).

Even though Bozeman verbally distinguishes between "individual human beings" and "men", he most likely did not explicitly include a gender perspective in his evaluation of western law outside the West. But a combination of feminist critiques of law with non-western critiques of law implies that the questionability of the modern understanding of law is extended to and creeping inside the West itself. - This process is probably contributing to what Berman sees as the revolutionary crisis of the western legal tradition.

Other writers who have dealt more with the legal system in studies of legal anthropology or legal pluralism have more explicitly questioned the western understanding of law.

Not only individual writers but also international institutions such as the ILO increasingly questions the modern legal system although up to now mostly in relation to its use in non-western countries.

"The continued growth of a semi-legal informal sector has demonstrated the limited effectiveness of the legal and regulatory systems. This should sharpen the will of policy-makers to overhaul their regulatory mechanisms - less with a view to enforcing unenforceable laws and regulations, but rather to reviewing the

8. Adda B. Bozeman (1971): "The Future of Law in A Multicultural World"

appropriateness of certain laws and regulations themselves. There is, indeed, a growing move towards greater flexibility in regulation." (1991, p.16)

ILO not just questions the modern legal system itself, but also the modern sector, which it considers may be part of the problems faced by the - often female - vulnerable work-force in non-western countries.

"Part of the problem may therefore lie in the so-called 'modern' sector itself, and in the laws, regulations and institutions that were designed primarily for its benefit, but which could in some cases be inaccessible, or even harmful, to the informal sector" (1991, p.20).

The concepts of the "informal sector" and "informal law" are not linked to each other in the sense that one produces the other. They are however both related to the modern sector and modern law respectively as phenomena, institutions and forms which exclude and disregard intermediate normative structures and forms.

The rise of the informal sector especially in the so called third world makes the dichotomic distinction in modern law between the legal and the illegal obsolete. The rising participation of women in both formal paid work (especially in the socalled first World, West or North) as well as in informal work (in the biggest part of the world) makes the distinction between public and private increasingly obsolete, and thus also the forms of law (statutory legislation and contract) which are based upon this distinction. This makes room for the emergence of other still underinvestigated normative forms and patterns, as well as of reflections upon other types of order.

Another critical voice against the concepts of western law has been raised by the Indian born American law professor, Surya Prakash Sinha.[9] He underlines and describes the cultural location of the theories of law. Law and legal institutions have played a central role in the particular cultural history of the West, but this function has in other societies been fulfilled by other principles of conduct and other institutions of social organization (1989a, p.5). He continues to portray some of these principles in China, Japan, India and Africa, but the main part of the book is dedicated to the description and critique of different western theories of law.

The theories attempting to define law have indulged in the fallacies of either assuming "that law exists everywhere, or they have ascribed a civilizationally superior status to the Western societies for being possessed of law" (1989b, p.22).

9. Surya Prakash Sinha (1989a): What is law. The Differing Theories of Jurisprudence

This status is however far from as secure as it was, although it may take some time before the signs of erosion make themselves shown and are acknowledged more generally.

Legal pluralism

The discussion on legal pluralism has especially been carried on within legal anthropology and legal sociology over a period of more than two decades. Much of this discussion has focused upon the situation in post-colonial states, where it has become very obvious, that the - historically - modern exclusive concept of law, with its focus on rules, was not the only normative force to guide societies. There are thus other important sources for engendering normativity than the law-maker, who is often understood as the sole producer of "modern law".

Sally Falk Moore has introduced the concept of the semi-autonomous social field (sasf), and has claimed that it has rule-making capacities as well as means to induce or coerce their compliance.[10] She has furthermore argued that an inspection of these sasf's suggests that "the various processes that make internally generated rules effective are often also the immediate forces that dictate the mode of compliance or non-compliance to state-made rules".[11]

Moore has carried out a number of studies on the situation in Africa, but in this specific article, she draws on western material, more specifically examples from women working in the garment industry - 'the better dress line' in New York. The suggestion of taking a sub-state level as a subject of a legal study thus necessarily also includes a shift in the attention from the modern concepts of law to other concepts of norms which have evolved 'spontaneously' out of social life.

The link between modernization, modern values, and modern law has been underlined by many authors, writing on legal pluralism and the developing - or perhaps un-modern - world. John Griffiths writes that "Uniform law is not only dependent upon, but also a condition of progress toward modern nationhood (as well as of economic and social 'development')".[12]

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10. Sally Falk Moore (1978): "Law and social Change: the semi-autonomous social field as an appropriate subject of study", pp.54-81

11. op.cit. p.57

12. John Griffiths (1986): "What is legal pluralism?" p.8

The search for modernity and the subsequent coexistence of different type of norms for different "sectors" of society, the modern and the 'un-modern', has thus in many post-colonial states this has lead to a situation of "formal" legal pluralism.

In the societies which were already considered "modern", and "industrialized", it seems much more difficult to accept an understanding of legal pluralism. This is perhaps the case because a self-description of a society as also encompassing plural legal forms, and not only a uniform model, does already also indicate a stage or level of either "pre-modernity" or a stage of dissolution "beyond" modernity.

Griffiths defines legal pluralism as a state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs. This seems to me to be a description or a descriptive definition which encompasses also the situation of women in "modern" societies, who act according to both formal and informal law and norms which they themselves create in their own interaction in the semi-autonomous fields in which they operate, and where they are not only acting according to, but also generating norms themselves.[13]

The usefulness of the concept of legal pluralism in an investigation of women's situation in western societies is to my view due both to the exclusiveness of the legal category of "modern law", and to the fact, that modern societies are not as modern as they claim to be. There are several parts of modern societies, which have not become modernized, and for modernity to survive, this is perhaps not possible either.[14]

Masaji Chiba has wondered why Western scholars are generally so reluctant to do research of legal pluralism in their own countries. He has stressed the necessity to develop a new scientific method which can secure accurate observation and analysis of the non-Western situation, but also underlines that legal pluralism must be extended to Western society.[15]

Even though the paradigm of legal pluralism may have become the dominant in legal sociology, as Griffith has claimed in a later paper (1992) this is still not the case in legal science itself where the old paradigm of the uniform, national legal

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13. Hanne Petersen (1992): On Women and Legal Concepts: Informal Law and the Norm of Consideration

14. See also Edward Shils (1981): Tradition, where he discusses the limits of modernity

15. Masaji Chiba (1989): Legal Pluralism: Toward a General Theory through Japanese Legal Culture, p.4-5

system, eventually complemented by one or more supra-national legal systems, continues to dominate in many respects.

The non-universality, the non-formality and the non-uniformity of (western) law which is stressed by the above mentioned authors in discussions on legal history, legal pluralism and legal theory are aspects which are also critized to a greater or lesser extent by the western feminist critique of law.

Feminist critiques of law

Most Western feminist critiques of the legal system have largely been ethno-centric and have in the initial phase been critiques of the claimed universality and uniformity of western law, whereas the formality of law, the state-relatedness and the western-ness has not been given as much attention.[16)]

As with several of the other critiques of modern law, feminist critique is understood as being specific, coming if not from a direct numerical minority, then at least from a group which has historically and academically been considered marginal and peripheral.

This has influenced feminist critique all over. In the case of Nordic Women's Law it has during the two decades of its existence always had a local, practical and pragmatic approach to its political and academic environment. Its existence and presence at some universities is less due to explicit academic acceptance of its critiques and its character, and perhaps more to general political conditions, and the change of the political and social scene in the Nordic countries where women have become more visible during most of the century.

The "political" and action-oriented character of this critique and its understanding of law makes Women's Law perhaps more part of a legal tradition underscoring processes and values, and less likely to become fully integrated within modern institutions of knowledge such as universities which have up to now stressed the technicality, rationality and objectivity of legal knowledge. Nordic Women's Law seems to have and in actual fact has achieved a certain recognition

16. This is also underlined in the introducing article by Yota Kravaritou to the anthology edited by her on "Feminist Approaches to Law and Cultural Diversity" (forthcoming).

through the work done by individual scholars, where the work of the late Norwegian Tove Stang Dahl deserves special attention.

But fighting against the exclusion of women's lives and experiences in legal theory which is caused by a strict concept of law is by no means a stage which has been overcome.[17]

Feminist jurisprudence has criticised western law for being **androcentric** and **gender hierarchical**. Men and male ways and mores have been at both the centre and at the summit of legal thinking (Dahl 1987, Gerhard-Teuscher 1981, Mackinnon 1989, Smart 1990).

This criticism of androcentricity - that the legal system has taken male life and values as the norm has also been raised by deconstructivists, such as Jacques Derrida, who has pointed out that it is not long ago that 'we men' meant "we, grown-up, white male europeans, carnivorous and able to bring sacrifices" (1990, p.951).

The criticism of gender hierarchy in the legal and social culture of western countries is based on the fact that dichotomies such as male/female (or culture/nature) are not just dualisms. They are organized hierarchically valuing one side higher than the other. Thus it was the grown-up, white male european who was entitled to legal standing and legal rights.

We are only slowly beginning to realize the historical and regional contextuality and cultural specificity of the legal systems but still often as outsiders within the same legal culture or at least often aspiring to become full members of it.

Some of the feminist critiques of western white feminist jurisprudence have come from the African American female lawyers, such as Kimberly Crenshaw (1988), Patricia Willians (1991) and Regina Austin, who in her article "Sapphire Bound!" proposes a legal jurisprudence grounded in the material conditions of the lives of black women in the US (1989).

The analysis done within the framework of the comparative legal research project "Women and Law in Southern Africa" (WLSA) has also led to some reconsideration

17. See for instance Anita Dahlberg (1993): "Androcentrin i juridisk utbildning" [Androcentricity in legal education]

of the Northern feminist jurisprudence and the usefulness of the values and claims by northern women when struggling for an improvement of the lives of black women in different African countries (Armstrong 1992, 1993).

Also the discussion of the legal role of muslim women in muslim countries as well as in non-muslim countries may lead to a less ethno-centric approach to the critique of law by feminist jurisprudence (see Dahl 1992, Mehdi 1993, Afshar 1993).

Furthermore a combination of the ecological critique of law with feminist critiques may contribute to - and challenge - western feminist jurisprudence (Petersen 1993a & b).

Western Ecologists have criticized western law for being **anthropocentric** - that is taking human beings (men and women alike) as the starting point for the legal system. From this point of view all other living and non-living entities have been denied legal standing in modern legal systems. And when you are denied legal standing you are very often also denied legal and social **protection** in modern societies. - Secular societies like many western societies do not formally protect natural entities - trees, animals, rivers etc. - because of their sacredness, as do other orders.

This leads to another critique of legal systems as being based on **species hierarchies** - that is placing the human species at the top of the legal pyramid. However the ecological critique may also be enriched by dialogue with feminist jurisprudence and other critiques of modern law.

Some of the solutions to this problem of anthropocentricity and species hierarchy have been to include other species in the existing legal system through concepts such as animal rights and discussions of a granting of legal standing to natural entities (Stone 1972, 1987, Feinberg 1974, Sitter 1984, Leimbacher 1988).

It is my allegation that what this critique has sought to obtain is mainly an accommodation of modern legal systems to the needs for protection of natural entities. A more severe challenge and change of these legal systems would probably have to not just to include other interests, groups and species by expanding the understanding of "modernity" and modern law, but to even sacrifice some of the "modern" values and priorities for a real de-centering and re-evaluation to take place.

What has become very clear in the general ecological critique as well as in some of the other critiques mentioned earlier is that several of them do in fact incorporate a severe critique of the hegemonic **values** of modernity. The ecological critique questions the concepts of development, progress and (economic) growth, and it values balance, variation and diversity. These values of balance, variation and diversity seem to be contradictory to the modern values of liberty, equality and fraternity.

In the following section I will discuss possibilities and limitations in the existing western legal tradition of including also women's lives and experiences in the concept of law. This I will discuss in relation to different forms of and theories about law, which could or do display an openness which allows for the inclusion of plural life styles, living conditions and values.

PRINCIPLES OF SACRIFICE AND INCLUSIVE LEGAL CATEGORIES

Gombrich argues that an investigation of the categories of art should concentrate not on the common traits and aspects utilized to categorize certain phenomena, but rather on the principles of exclusion - upon what and who have been excluded from the category investigated.

In employing this approach upon the study of "law" I have alleged that the principle of excluding norms and practices concerning lives and relations of (relevance for) women from the category of modern law has been one important principle of exclusion.

There are however a number of legal phenomena and perceptions of the concept of law, which if they were considered more important would allow for a greater recognition of the lives of women and of the multiplicity of practices and values lived out in these lives.

One could perhaps call the search for these a reconstructive or affirmative activity for the legal "scientist-cum-participant" (see also Damus 1989). - The acceptance or acknowledgement of these concepts of law or theories about law could also imply the application of what Gombrich calls a "principle of sacrifice". In order to include norms and practices of relevance for the great majority of women into reflections upon order of contemporary society, it will be necessary to

sacrifice - to give up the hegemony of the values so strongly connected to the understanding and categorization of modern law. These are the valuation of uniform rules which are supposed to be generally valid for everybody.

This is not to say that the values of uniformity, generality and rule-bound regulation are to be totally abandoned, but that their hegemony and their claim to be the absolute and highest values in any case must be questioned - which in fact is already the case.

What has to be sacrificed is (to my view) not the modern values as such, but their claim to absolute superiority in every matter. The admittance and acknowledgment of a multiplicity of values will imply a concrete balancing and consideration of the modern values of uniformity, equality and generality against emerging "post-modern" - and contested - values such as for instance plurality, diversity, difference, spirituality and contextuality, as well as against other forms of "extra-modern" values such as for instance gender specificity, separation and tradition. The undertaking of identifying and confirming a broader range of values is probably a venture which can be neither unilateral, unilinear nor once and for all. It is a process of which we are already part, and which is likely to go on for a long time to come, and I doubt that is will be desirable or possible to proclaim any of the emerging values the new dominant values. Hopefully there will be room for combinations and clusters of values operating at different occasions and in different situations.[18)]

The theories, categories and classifications of legal phenomena, which might be less exclusive of women's experiences and which will be treated below are 'customary law', legal polycentricity and legal pluralism, legal hermeneutics, postmodern law and theories about legal cultures.

This list again is most certainly not exhaustive but it may indicate some of the possibilities of including norms and practices related to women's lives in the study of law - or the possibilities of sensitizing jurisprudence to the realities and needs of women.

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18. One recent example of a discussion of values is the Report of the Director-General of the ILO on occasion of the 75th Anniversary of the International Labour Organization 1919-1994. The report is entitled "Defending Values, Promoting Change. Social justice in a global economy: An ILO agenda." As the title indicates there is little direct attempt to formulate "new" values or priorities in the report, but it does underline the importance of a "new consensus around a set of common values" (p.26)

Customary law

The concept of customary law as a subcategory under the category of law might be a concept which could allow for a greater consideration of experiences and practices related to women.[19] As already mentioned and as elaborated further upon below, this will however require a certain reconsideration and reconceptualization of custom. I have already mentioned the differences in the European and the African concept of customary law.

Customs obviously existed before the uniform modern legal system. Arnaud (1992) has mentioned that it is only with modernity that pluralism becomes a problem. Medieval theory on custom considered the people the creator of customary law, whose binding force was independent of any additional act of a higher criteria. This made it necessary to lay down certain fundamental conditions that had to be fulfilled by the creating agency, the people, if their customs were to display binding force (Ullmann 1969).

Women, minors, and insane persons were not considered belonging to the people, and thus not considered able to create custom. The reason, certain modes of behaviour had binding force, was ascribed to the **tacit consent**, which may be described as the will of the people to impose obligations and confer rights (Ullmann 1980). According to Ullmann

"(t)he conception of Customary Law thus included two elements, namely an internal, the tacit consent, and an external - the acts themselves; the former is "ratio essendi", the latter "ratio cognoscendi" (Ullmann 1980, p.269).

Consent should be free. Conditions concerning the lapse of time, the continuance during a certain length of time were controversial. Conditions were also discussed concerning the recognition of the consent - the frequencies of the customary external acts. In general a **valid** custom in both constitution and abrogation of laws, produced the same effects as legislative acts. - Thus there existed no hierarchy between custom and legislation.

The **reasonableness** of custom was an element necessary for its validity. Customs which proved disruptive to the established political order were not valid (Ullmann 1969).

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19. This section is partly based upon my earlier paper (1992b) "Reclaiming Juridical Tact? Observations and Reflections on Custom and Informal Law as Sources of Polycentric Law"

This independence of locally generated customs constituted a threat to the uniforming intentions of the modern legal system of the nation state.

Since it was not possible to suppress them totally they were accepted as true legal norms recognized by a monistic legal understanding and jurisprudence, provided they meet certain criteria. These criteria concern the generality, the stability and the duration of the custom in question as well as its recognition by a state legal authority (the courts). Mostly criteria which were taken over from medieval theory and modified for the - limited - use in a uniform modern legal system. The English integration of customary law in modern law has taken place through common law. But Peter Goodrich underlines that common law was "neither commonly available nor readily accessible to the people it supposedly represented".

"It was for the courts to decide the nature of any given custom and it would be naïve in the extreme to suppose that the early local courts were immune to the political and economic pressures of the feudal nobility they served." (1986, p.63)

Thus Goodrich is of the opinion that

"contrary to the prevalent view of law as the perfection and inheritor of custom.. it is probably a more accurate generalization to see law or 'legal order' as a destructive force, as the assassin rather than the pinnacle of non-legal or customary orders" (1986, p.63f).

He relates this to the relationship between European and non-European cultures as a specifically significant example.

If one considers the fact that customs are not only specific according to social groups and classes, but also according to gender, his observations hold true also in the European context.

The creation of practices and informal law in women's workplaces, which I investigated in the relationship between paid work-life and family-life of women employed in the public sector in Denmark, constitute one among other examples of gendered practices and customs.[20] When investigating the cases concerning industrial customs which had been accepted and dealt with by the arbitration courts, I found however hardly any traces of these gender-specific customs. The actual gender specific customs were thus excluded from those customs which in the modern legal system might qualify to be considered "customary law".

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20. Hanne Petersen (1991): Informel ret på kvindearbejdspladser. En retsteoretisk og empirisk analyse. Akademisk Forlag, Copenhagen

Ivan Illich in his book(s) on "Gender" makes an observation, which is relevant in this respect. In a note on "women and law" he writes,

"All known unwritten, customary law is gender-specific. European written law is decidedly patriarchal and the law of the modern nation-state is unfailingly sexist" (Illich 1982 p.29, references omitted).

In the **German** version of the book Illich undertook slight changes. Thus the same note is somewhat altered and expanded

"Custom is also gender-specific (see notes 80-83). Also where formal law makes custom a source, the result - at least in European history - will be a patriarchal order. The constitution of the modern state has sexist consequences exactly where it intends to abolish patriarchy. The gender-specific custom, patriarchal law (statute) which places women as a group under men, and modern law, which assumes that gender-neutral human subjects exist, cannot be investigated with the same categories" (Illich 1982, note 17 - my translation).

Since customs - as repetitions of practices - do of course also encompass the gendered practices developed by women the category of "customary law" could theoretically also encompass customs and practices of relevance for women's lives. It would however have to expand the criteria for when a custom and practice can be accepted as "legal" and thus become "customary law".

The period of suppression of custom in national law has at the same time been the period where "law" sought to become and claimed to be value-neutral. Ethical and philosophical discussions about what is "right" and "good" about law, were of less interest.

It seems as if not only law, but also philosophy has fallen prey to the hegemony of the modern state. Leiser (an american theologist and philosopher) in a small book on "Custom, Law and Morality. Conflict and Continuity in Social Behaviour" (1969) writes that "of the great triumvirate - morals, law and custom - only one has suffered virtually complete neglect at the hand of philosophers" that is custom.

Leiser writes about the relationship between custom and morality or ethics that

"Custom <u>does</u> determine what is right and wrong, just as it reflects what people believe to be right and what they believe to be wrong. In this way it enters into our conceptions of moral right and wrong and raises questions in the minds of moral philosophers about the relativity of morals. For clearly, just as the custom of one

time and place is not that of another, so also moral right and wrong differ from place to place and from time to time..(Leiser 1969, p.159).
Leiser here deals with a broader concept of custom than those customs which have been transformed into customary law.

He underlines the ethical element of custom, the links between custom and morality, and asks to what extent and in what sense does custom serve as a source of morals; what are the effects of moral prescriptions upon customs and what are (or ought to be) their relations (Leiser, p.163).

It could seem that the customs and practices relating to women's lives and experiences are more concerned with processes and principles and with what is considered good and bad (in concrete situations) and less with rules and one time events. Thus a concept of custom which should be able to encompass women's experiences should be more concerned with process and principles (or rights as de Sousa Santos writes) and less with forms and abstract rules. This would however easily infringe upon the unifying intentions of the modern legal system.

Legal polycentricity and legal pluralism[21)]

Most modern legal theories are dominated by a monistic understanding of law. This paradigm asserts that the "legal" order is structured around one centre, in relation to which all principles, rules and norms are founded. Legal polycentricity as it has been discussed in the Nordic countries, attempts to study "law" from a pluralist approach. - Legal norms are not understood as issued by or linked to

21. My views upon legal polycentricity have been developed during my colloboration with different colleagues at the University of Copenhagen. During the period from 1990 to 1993 two of my colleagues, Henrik Zahle, professor of constitutional law, and Kirsten Ketscher, professor of social welfare law, and I had a joint research project on "Polycentric and Ecological Perspectives on Law" financed by the Danish Council of Social Research.

The term "polycentricity" was first used in a Nordic legal context in 1986 by Henrik Zahle in an article entitled "Polycentri i retskildelæren" [Polycentricity in the theory of legal sources". One of the publications which has appeared as a result of the research project is Peter Blume & Hanne Petersen (eds) (1993): Retlig Polycentri [Legal Polycentricity], Akademisk Forlag, Copenhagen (A Festschrift for Henrik Zahle). Another is a special issue of the Nordic legal journal, RETFÆRD, (1994) entitled "Law and Ecology". An anthology edited by Hanne Petersen and Henrik Zahle entitled "Legal Polycentricity. Consequences of Pluralism in Law", will hopefully be published in 1995.

In 1992 a Finnish research project on "Polycentric Law" was initiated by professor Lars D. Eriksson, the university of Helsinki, in cooperation with Juha Pöyhönen, Ari Hirvonen and Panu Minkkinen. The research project is organizing a conference entitled "Fragments" in December 1994.

one exclusive authority to whom or which all other norm initiating entities are subjugated. The doctrine of hierarchically structured legal sources is problematized, and the term legal polycentricity indicates an understanding of legal norms - or legal sources - as being engendered by different, overlapping, coexisting, cooperating and/or competing centres. They may also be termed semi-autonomous fields (Moore 1978) or networks, some of which are equivalent to nation states or the economic community, some of which are local but some of which also encompass fields or networks which are not delimited by territory (Vanderlinden 1989).

A legal polycentric approach to law underlines the problems of the professed value-free, neutral and so-called objective approach, which has been dominant in modern law such as Scandinavian realism. Polycentricity reveals and demonstrates not only formal but also axiological differences underlying the different legal systems (see also Sinha, 1992). An empirical investigation of different types of norms does not automatically include an acceptance of the different values underlying these norms. It does however imply a more profound examination and evaluation of the different values at stake and a process of reconciling values rather than subjugating some under others. There is more than one single source for legitimacy and legitimate argumentation.

Norms generated within multiple centres, semi-autonomous fields or networks are pluralistic not only in form but also according to the values they promulgate. This is a challenge for a hierarchical single-value approach to "legal" order.

Empirical investigations carried out within the framework of legal pluralism demonstrate that multiple norms - also in western countries - are not necessarily organized hierarchically in the way modern western jurisprudence has primarily perceived law. This poses another challenge for the modern legal paradigm.

The origin of the concept "polycentricity" is blurred but it is perhaps mostly used in sociopolitical analysis.[22)]

If one should distinguish between legal pluralist and a legal polycentric approach to law the difference lies perhaps mainly in the perspective. Whereas the legal anthropologist and legal sociologist may mostly tend to understand and

22. The concept has for instance been used in the title of a book by Samir Amin (1990): Delinking: towards a polycentric world

describe the legal landscape from outside, legal polycentricity approaches legal science from within and tries to reach another understanding - and practice - of law. Legal polycentricity attempts to contribute to a change of the understanding of law from inside. In this sense it may be perceived as a continuation of the attempts to develop an "alternative dogmatics" launched originally by our Finnish colleague Lars D. Eriksson[23].

Legal pluralism is a well known concept in legal sociology and legal anthropology - so much that John Griffiths in his article claims that the "new paradigm as far as the social scientific study of law is concerned, is legal pluralism". What Griffiths understands by legal pluralism is: the legal order of all societies is not an exclusive, systematic and unified hierarchical ordering of normative propositions depending from the state, but has its sources in the self-regulatory activities of all the multifarious social fields present in society.

- As far as the legal dogmatic study is concerned this shift of paradigm has however not yet taken place fully. Wilhelmsson stresses that "the paradigmatic concept of law is still the (one) and only law of the national state" (1992). This is perhaps a somewhat exaggerated statement especially within the framework of an expanding legal community such as the European Union, but nevertheless it captures much of the climate of contemporary western thinking about law.

The introduction of the concept of legal polycentricity may be understood as an attempt to bring about this shift of paradigm, also within legal science itself.[24] The intention is however not to pave the way for an understanding of the regional - European Union-wide - regulation as a hegemonic successor concept, but to allow for a greater acceptance of the interrelations and interdependence of different types of norms on regional, national, and local levels. - To some extent it is a question of reintroduction of earlier concepts of plurality since legal monism is a relatively recent phenomenon.

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23. A discussion related to the work of Lars D. Eriksson on alternative legal dogmatics can be found in Tuori, Kaarlo (ed) (1988): Rättsdogmatikens Alternativ [Alternative to legal dogmatics]. Juridica, Tammerfors

24. Another Danish professor of sociology of law, Jørgen Dalberg-Larsen has recently published a book, which has been inspired by the discussion on legal polycentricity, entitled "Rettens enhed - en illusion? Om retlig pluralisme i teorien og i praksis" [Legal Unity - an Illusion? On legal pluralism in theory and practice], (1994) Akademisk Forlag, Copenhagen

The concepts of pluralism and polycentricity of law have a bearing on a number of questions concerning the western understanding of law.

A polycentric approach to law can easily accept that law is not a universal principle or order - as argued by Sinha in several of his works. A polycentric understanding of law necessarily addresses epistemological questions. What is law - or what is considered law? By whom and how?

It is perhaps interested in issues of "order" as much as in "law". Where and how is order brought about ? In which different centres and by whom and how? What aspects of such "orders" could be considered legal sources under the present conditions? What is the impact of a polycentric understanding of law and/or order on established concepts and categories in jurisprudence? How to address and understand the division between public law and private law, a division which may now be heading towards collapse or implosion, but which has been and in many respects still is of importance for many women.

Some of the important and difficult questions raised by the use of concepts as legal pluralism and legal polycentricity seem to be axiological questions - questions of the values underlying polycentric legal orders and questions of how these differing orders conflict, and/or attempt to coexist. Which orders are bearers of which values? Some women in the countries of southern Africa may find the unilateral focus upon freedom and equality - values highly estimated by Scandinavian women's law - an obstacle to the aim of improving African women's position in law and society in local, rural but also urban contexts.

Conflicts between values of polycentric orders and their solution are important questions to deal with for a polycentric approach. Masaji Chiba has described how pluralism exists not just in social reality, but also as in subjectivity, causing "legal ambivalence" in the individual (1991 & 1992). This very interesting aspect has to my knowledge not been dealt with in western jurisprudence.

The theoretical approaches to law, which we have called legal polycentricity, seem to allow for an inclusion of multiple norms - and multiple forms - arising from multiple centres. This is an approach which is also favourable towards an inclusion of a plurality of values. Thus it does also allow for a reflection and incorporation of practices and principles of relevance for women's lives.

Some of the dangers of a polycentric approach is that it may tend to neglect intrafield structures and the dominance of some interest groups over others in the polycentric landscape. For instance norms developed among women may not reflect the lives of all women equally and may not benefit all women equally. - Thus the question of the underlying power struggles about the competing norms may become more urgent within the framework of a polycentric understanding of law.

Legal hermeneutics

Hermeneutics may be another method to understand "law", which may also to a certain extent allow for inclusion of normative aspects of women's experiences in the study of law and legal order.

The focus upon tradition, values, and argumentation in legal reasoning - rather than a focus upon absolute certainty or scientific logic - may permit an inclusion of normative material and discourse which can be beneficial for women. Not necessarily because these traditions and values must in themselves be advantageous for women, but because the interpretive method enables material to be taken seriously - also when it is criticized - which may otherwise be swept aside as irrelevant.

Peter Goodrich describes the "legal art [as] an art of interpretation" and hermeneutics as the discipline that studies the rules of interpretation and understanding of recorded expression or text - the discipline whose task is that of interpreting transmitted texts (Goodrich 1986). For hermeneutics the role of history, of the context, of tradition is of utmost importance.

"For hermeneutics understanding and interpretation always takes place within the context of tradition and as an elaboration of the values of tradition, themselves perceived as the community and common sense of the historically prior culture" (Goodrich 1986, p.135).

This importance of tradition in the creation of the new is also underlined in a Norwegian textbook discussion of the three central elements of the hermeneutical methods, which are described as supposition, the dialectical relation between part and totality and the hermeneutical circle (Doublet & Bernt, 1993).

The authors see the normative sciences, to which the legal science belongs, as sciences which do not tell anything about how reality is, but how it ought to be. The hermeneutical totality perspective thus includes the norms and values of the

past as well as of the present as references for the interpreter of the text. The focus upon the contextual framework in hermeneutics according to Bernt and Doublet allows for a better understanding of the role that value considerations, evaluations and other considerations[25] play not just within legal science but especially within the legal method (p.89). Bernt and Doublet consider legal hermeneutics a tool which may mediate the tension between the conditions within science and its relations to society and value contexts (p.92).

The late Norwegian professor of Women's Law, Tove Stang Dahl, in 1988 wrote an article entitled (in translation) "Towards an interpretive theory of law. The argument of women's law". In this article she argues that an open hermeneutics is a methodology which is specifically well suited for a law which is undergoing change, no matter whether the legal scientist wants to participate in the ongoing changes or not (Dahl, 1988 p.68).

She proclaims that if we want to improve the situation of women in law, from what she calls the standpoint of the acknowledgment of everybody as co-legislators, then it will soon turn out that the traditional theory of legal application is not very suitable.

Some of the areas where she considers that changes are taking place is in the application of law which increasingly takes place within the administration. Whereas legal dogmatics primarily has been interested in and addressed the courts, women's law has addressed the general public, parliamentarians, the administration and women's groups of different kinds. Legal theory and with it not the least women's law has increasingly become interested in the decisions of the first instances both in the judicial and in the administrative hierarchy as well as below this level. This presents fruitful challenges also to legal dogmatics.

My own point has been that it is not only the application of "law" which is shifting fora as well as level, but that this holds true also for the creation of "law" - there is no longer any singular "legislator" or "law-maker" (Guibentif 1993, p.83).

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25. The term used in the text (p.89) is "reelle hensyn" which is a specific Norwegian legal term, which deals with considerations about equity, related to the discussion about the "nature of the matter" in the chapter on the "Norm of Consideration".

The view I have developed has been inspired by Clifford Geertz and others. As one of the leading representatives of interpretive anthropology, he has also written about similarities between law and anthropology, and has described his own approach to adjudication as one that

"assimilates it not to a sort of social mechanics, a physics of judgment, but to a sort of cultural hermeneutics, a semantics of action (Geertz 1983, p.182)

He considers law as "part of a distinctive manner of imagining the real" (p.184), and underlines the "locality" of law.

"Law.. is local knowledge; local not just as to place, time, class, and variety of issue, but as to accent - vernacular characterizations of what happens connected to vernacular imaginings of what can. It is this complex of characterizations and imaginings, stories about events cast in imagery about principles, that I have been calling legal sensibility." (p.215)

This has implications for the comparative study of law, which according to Geertz is neither a matter of reducing concrete differences to abstract commonalities, nor of locating identical phenomena masquerading under different names. Comparative study of law must "relate to the management of difference not to the abolition of it" (p.216), and it should consist in cultural translation. Geertz sees law as "meaning, not machinery" (p.232), but this view involves a shift from functionalist thinking about law to a hermeneutic thinking about it - "as a mode of giving particular sense to particular things in particular places" (p.232). Clifford Geertz's use of the hermeneutical method is thus less related to texts and more to the intertwinement of fact and law.

I do agree with Tove Stang Dahl that hermeneutics is probably a useful method and concept to grasp and contribute to changes in the legal field, such as the changes that are taking place because of attempts of inclusion of some of those groups whose experiences have hitherto been excluded from the category of law.

But it seems clear to me that to become truly inclusive, also of the experiences of women and the normative aspects and meaning of women's experiences, the method cannot limit itself to the interpretation of texts. It will have to consider other normative material - among that behaviour - and try to contribute to giving this material and behaviour meaning.

Postmodern law

Within recent legal theory the formal hierarchical concept of law which also served as a means for national unification and modernization of societies, can no longer uphold its position as the concept which exhaustively is able to cover all normative orders encompassed by post-modern or reflexive law (see also Carty 1990, p.1ff and Douzinas & Warrington, Gaete, and Goodrich, all in Law and Critique 1991)

Post-modern legal theory in the Western world thus understands "law" within a context different from the nation state. It claims that some of the implications of these developments and conflicts are that the definition of "public interest" can no longer be the monopoly of the state, that the individual is no longer the focal point of the legal system (it is replaced by groups, organizations, networks and perhaps relations), and that the hierarchical unity of legal doctrine and of the legal text (especially the written constitution) does no longer hold (Ladeur 1986).

The idea about autonomous social subsystems, as the relevant legal framework, which is central to the theory of reflexive law, is very close to Sally Falk Moore's concept of the "semi-autonomous social field". The theories about reflexive law are based on descriptions of existing trends and tendencies within the legal system as well as on prescriptions about how and in which direction the legal system ought to develop.

The theories are linked together by a perception of the vanishing importance of the state level and of law as a state instrument to bring about material social change. Focus is shifted from state level to other levels among them subsystem level, and from material law to procedural law. Some of the consequences of these developments within the field of law are considered to be that legal theory and legal dogmas will become relativized (Ladeur 1986).

In an article which has been translated into English, "The Discourse on the Sciences" Boaventura de Sousa Santos underlines the changing paradigm of sciences, as among others one where all scientific knowledge aims at becoming common sense.

"Post-modern science tries to rehabilitate common sense for it recognizes in this form of knowledge some capacity to enrich our relationship with the world. Common sense knowledge, it is true, tends to be a mystified and mystifying knowledge, but in spite of that, and in spite of its conservative quality, it does have a utopian and liberating dimension that may be enhanced by its dialogue with scientific knowledge" (1992, p.44).

Common sense is characterized by collapsing cause and intention - which is clear when women for instance act in consideration of other women's relations and obligations outside the work-place. Common sense is practical and pragmatic, it is self-evident and transparent, as well as superficial, but for this reason also capable of capturing complexity. Common sense knowledge is non-disciplinary and non-methodical, and finally it is rhetorical and metaphorical "it does not teach, it persuades" (p.45).

In the emergent paradigm, de Sousa Santos claims, knowledge is both total and local, as it is "gathered around themes adopted by concrete social groups at a given time as projects of local life" (p.38).

"Though total, post-modern knowledge is not deterministic, though local, it is not descriptive. It is knowledge about the conditions of possibility. It is knowledge about the conditions of possibility of human action projected into the world from local time-spaces. Such knowledge is relatively unmethodical since it springs from methodological plurality" (p.39).

The implication of this is a break-up of the disciplines, and a knowledge oriented towards solutions of concrete problems and projects. This has implications also for the concepts and categories utilized, among those the concepts of law and causality, which are put into question.

"In biology, where interactions among phenomena and forms of self-organization in non-mechanical totalities are more visible, but also in the other sciences the notion of law has been partially replaced by the notions of systems, structure, pattern, and finally by the notion of process. The decline of the hegemony of laws is parallel to the decline of the hegemony of causality" (p.26f, emphasis added here).

Such a shift from a focus upon form to a focus on content and process may allow for an inclusion of the lives and experiences of women and other human beings - and perhaps also of non-human beings - in the concerns of "lawyers" and others interested in social order.[26]

26. In my empirical work I realized the importance of patterns and processes in the lives of women. This importance has been further underlined by my acquaintance with the empirical work by WLSA on maintenance and inheritance, which repeatedly stresses that phenomena of great significance for women, such as maintenance, marriage and inheritance, take place not as rule-bound one time events but in the form of complex processes over time which may be the subject of dispute, negotiation and interpretation.

Theories about legal cultures

The emergence of a body of literature and a field of study under the heading of "legal culture" or "law and culture" since World War II and especially in recent years is another indicator of the non-universality of western law[27].

The Indian lawyer Upendra Baxi in an article on "The Conflicting Conceptions of Legal Culture" refers to two complex meanings of culture, where the first is culture as an "inner process" and the second is culture as a "general process". This distinction he sees as being related to the distinction between "culture **of** the law" and "law **as** culture" in sociological jurisprudence.

"The 'inner' processes which the notion of culture of law directs us to grasp are the processes of producing meanings which produces practices and of practices which produce meanings within the presumed agencies of 'legal life'. The 'general processes' which the notion of law as culture directs us to is the law as social configuration providing 'whole ways of life'" (Baxi 1991, p.273).

According to Baxi the conception of law **as** culture typically lends itself to an epochal analysis of culture, whereas legal culture viewed as a culture **of** law is particularistic, and focusses on the lived relationships between societal values, beliefs and attitudes articulated through law and law-related social behaviour.

In accordance with Gombrich's ideas of the principle of exclusion the introduction of the term "legal culture" may indicate a reaction against the relative suppression or disinterest in the framework of law in the beginning of the century, when law was viewed as machinery in line with the dominance of the natural sciences also in the humanities.

With increasing empirical evidence of the non-universality of law as well as the growing challenges of this view of law as universal the theories of law and culture seem to offer a possibility of approaching law as a multifaceted phenomena, inter-dependent with its cultural environment. This development is in accordance with the general emerging shift of paradigm in the sciences. In the relation between the natural sciences which offered the model for the social sciences for the majority of the twentieth century the situation now seems to be the reverse.

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27. See Masaji Chiba (1989): Legal Pluralism: Toward a General Theory through Japanese Legal Culture. Tokai University Press. Especially Chapter 3 "Cultural Universality and Particularity of Western Jurisprudence", Chapter 11 "The Identity Postulate of a Legal Culture" and Chapter 13 "Legal Pluralism on and across Legal Cultures".

Boaventura de Sousa Santos claims that "to the degree that the natural sciences are getting closer to the social sciences, the social sciences are getting closer to the humanities" (1992, p.35). - The human sciences he writes, "have preferred to understand the world rather than to manipulate it". In this he is in line with Baxi who in the above mentioned article writes that comparative studies of legal cultures will help us remove the continual impoverishment of our sensibility,

"they even provide us with a hope that jurisprudence will some day begin to belong to the humanities as much as it now does to the social sciences" (Baxi 1991, p.275).

Thus the increased interest in culture and cultural phenomena, also have links to the growing interest in hermeneutics and legal pluralism.

The interest for the study of legal culture seems to be growing also in western societies. Within the European Union this is probably not surprising given the fact that a number of national legal systems come together in attempts to converge, harmonize, and coexist, a process which also demonstrates the differences between not just the legal systems but even more the socio-cultural environment in which these systems are embedded.

The implications of and potentials for theories of legal culture for women have only recently begun to be explored.

"Legal culture derives from the civilization and history of each country and is crucial in determining the way of life and the condition of women - a condition which varies too widely to permit generalisation, but rather demands comparative study, which remains to be done."[28]

The focus upon "legal cultures" may allow for a greater understanding of some of the elements in and around law which contribute to the exclusion of women from law.

The deep roots of contemporary law in the patriarchal structure of our societies makes it tempting to see our legal culture as part of a patriarchal culture.[29] The distinctions between "residual cultures", "emergent cultures" and "dominant cultures"[30] may be helpful categories in the analysis of the impact of law as culture as well as of the culture of law upon the lives of women.

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28. Yota Kravaritou: Feminist Approaches to Law and Cultural Diversity (introduction to anthology of the same title edited by Kravaritou - forthcoming)

29. op.cit. p.3

30. This distinction is mentioned by Baxi, who quotes another author of a book on "Marxism and Literature", (1977) Raymond Williams, p.277

The aim of feminist jurisprudence is not just to criticize old categories for their exclusive consequences and not just to introduce new categories, but to introduce categories which serve the purpose of improving the situation of women in law and to sensitize jurisprudence also to the role of gender.

This could perhaps imply a search for and interest in these elements of cultural surrounding which have allowed women to keep or develop female identities. With increasing acknowledgment of the diversity among women it will of course be of utmost importance **not** to look for any monolithic uniform female identity, but to keep an open mind.

I share the hope expressed by Baxi who sees in the interest in legal cultures

"a new hope for jurisprudence, a new hope for the fellowship of juristic learning. Possibly, they herald the birth of a new sensibility enabling the thinking humanity to suffer and the suffering humanity to think. For long, such a sensibility was needed in the human science of jurisprudence; we have at long last now, in jurisprudence a whole new structure of feeling equipping us to take people's sufferings seriously" (Baxi 1991, p.269 - notes omitted).

Conclusion

In outlining the principles of exclusion of women's lives from Western law as one of the principles of exclusion in the categorization of normative phenomena that are part of the social order, I have only addressed one element among several of the elements which have been excluded from the category of "law".

The exclusion of body, emotions and suffering from consideration in western law has important impact for both women and men.

The section on understandings and critiques of modern law only deals with some of the strands of critique. - Critiques which for me have been of importance in understanding the feminist critique and feminist jurisprudence, but which do not cover the variety of critiques, which could have been discussed, nor the profundity of the critiques dealt with. What seems to me to unite these approaches and feminist jurisprudence are that all of them attempt to understand the limitations of modern law.

The section on inclusive legal categories again discusses categorizations of law which are not necessarily dealing specifically with the role of women nor with the relation between women and law, but which will allow for an inclusion of some of the manifold experiences and practices which form important parts of women's

lives. Experiences and practices which give meaning to women's lives and which since they rest on meanings and values contribute to the formation of new practices and normative experiences of relevance and importance for women - but not only for women.

Some of these inclusive categories seem to me to offer a hope, not just for a jurisprudence becoming more aware of some of the sufferings of some of the women who form part of humanity - but also for women, who may because of the expansion and increased sensibility of legal thought become and consider ourselves participants in the processes for forming and creating responsible presents and futures.

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